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SUPREME COURT, U.S.

83-5148
No. ~~82~~

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JOSE MARTINEZ HIGH,

Petitioner,

vs.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Does the infliction of the death penalty on a child under the age of 18 at the time of the offense constitute cruel and unusual punishment?

2. What standard of competency of defense counsel is required in capital cases to satisfy the Sixth, Eighth and Fourteenth Amendments?

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Petitioner, JOSE MARTINEZ HIGH, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in this case.

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported in High v. Zant, ___ Ga. ___, 300 S.E.2d 654 (1983), and is appended hereto at 1a.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on March 1, 1983. A timely motion for rehearing was denied on May 11, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and intending to here assert deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence;

the Eighth Amendment to the United States Constitution which provides:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the United States Constitution which provides in relevant part:

> No state shall ... deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Jose Martinez High seeks a writ of certiorari from this Court to the Supreme Court of Georgia to review a decision of that Court upholding the denial of his petition for a writ of habeas corpus which challenged his convictions and sentence of death.

Petitioner asserted in his habeas corpus petition in the Superior Court of Butts County, Georgia, that he was being detained wrongfully by the respondent pursuant to convictions of murder and other offenses and a sentence of death which were imposed upon him by the state of Georgia in violation of his rights guaranteed by the Constitution of the United States. He sought to vacate his convictions and sentence of death alleging, inter alia, that he was denied the effective assistance of counsel at the penalty phase of his capital trial and that it was cruel and unusual punishment for a person under the

age of 18 years at the time of the offense to be sentenced to death.

The Superior Court of Butts County denied the petition for a writ of habeas corpus. The Supreme Court of Georgia granted petitioner a certificate of probable cause to appeal and reviewed the ruling of the Superior Court of Butts County. The Supreme Court of Georgia upheld the denial of the petition for a writ of habeas corpus.

At petitioner's trial, the state presented evidence that late on July 26, 1976, a car with three occupants arrived at a service station in Taliaferro County, Georgia, where one Henry Phillips worked. The three men got out of the car and petitioner, identified as one of the three, robbed Phillips at gunpoint. Tr. 373-376. Mr. Phillips testifed that he was then ordered into the robbers' car, tr. 376-377, and soon found himself in the woods along with his step-son, Bonnie Bulloch, who had been with him at the service station. Both were told to lie on the ground, shots were fired, and when Mr. Phillips regained consciousness, his step-son was dead. Tr. 379-383. The state also introduced at trial several inculpatory statements by petitioner. Tr. 607-610, 773-775. Petitioner presented no evidence in his defense at the guilt-innocence phase of his trial.

After the jury returned findings of guilt of murder and related counts, the jury was reconvened to determine whether the punishment of death or life imprisonment was proper. Neither the state nor petitioner produced any evidence at the sentencing hearing. The jury recommended that petitioner be sentenced to die, finding the existence of aggravating circumstance, Ga. Code Ann. § 27-2534.1 (b)(7), which allows for the death penalty where

the offense of murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." The Court, accordingly, sentenced petitioner to die and the conviction and death sentence was upheld on direct appeal by the Supreme Court of Georgia. High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981), cert. denied, 455 U.S. 927 (1982).

Thereafter, petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, where he is confined on death row awaiting execution. The Superior Court first summarily denied the petition the day after it was filed. The Supreme Court of Georgia, however, remanded the case to the Superior Court on petitioner's application and ordered it to hold an evidentiary hearing. The Superior Court did so on August 12, 1982. The Superior Court denied petitioner's motion for funds to retain counsel, investigators, experts and law clerks to aid him in the presentation of evidence in support of his contentions. Petitioner's request for authorization to subpoena witnesses and for witness fees and mileage also was denied. As a result, petitioner was represented by volunteer counsel at his hearing.

Petitioner thereby was precluded from calling witnesses in support of his claim that he was denied the effective assistance of counsel at his penalty hearing because the witnesses resided in the Augusta, Georgia area, a 2 to 3 hour drive to the location of the habeas corpus hearing. Instead, petitioner presented affidavits of 16 persons to demonstrate that compelling evidence in mitigation could have been presented to the jury that sentenced him to die, but was not offered because of the failure of his trial counsel to investigate his background

and prepare properly for the penalty phase of his trial. The respondent offered the testimony of the lawyer who represented petitioner at his trial.

HOW THE FEDERAL QUESTIONS WERE PRESENTED AND DECIDED BELOW

1. Petitioner alleged in paragraphs 55 - 57 of his petition for a writ of habeas corpus that it was cruel and unusual punishment for a child under the age of 18 at the time of the commission of the offense to be sentenced to death. The Superior Court found no merit in this claim without stating a reason other than it was previously "raised in the Petition For a Writ of Certiorari to the Supreme Court of the United States." Op. at 3, app. at 13. Petitioner presented the identical claim to the Supreme Court of Georgia in section Q of his application for a certificate of probable cause to appeal and in section 17 of his brief on the merits. The Supreme Court of Georgia rejected the claim, stating "[t]he imposition of the death penalty is not cruel and unusual punihsment per se simply because High was a minor at the time of the offense. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)." High, 300 S.E.2d at 662, app. at 9.

2. Petitioner alleged in paragraphs 6 - 8 of his petition for a writ of habeas corpus that he was denied the effective assistance of counsel at the sentencing phase of his trial. The Superior Court held that petitioner was provided effective assistance at his sentencing hearing. The court applied the standard set out in MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961), and Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974): " ... not errorless counsel and not counsel judged ineffective by

hindsight but counsel reasonably likely to render and rendering reasonably effective assistance." Op. at 6, app. at 16. The Court did not mention either the Sixth Amendment or the Eighth Amendment in its opinion although both grounds were alleged in the petition for a writ of habeas corpus.

In section A of his application for a certificate of probable cause to appeal and in section 1 of his brief on the merits to the Supreme Court of Georgia, petitioner alleged that the failure of trial counsel to present any mitigation evidence at sentencing deprived petitioner of the effective assistance of counsel. The Supreme Court of Georgia compared the evidence of guilt with the evidence presented in mitigation at the habeas hearing and rejected the claim, concluding that the "habeas corpus court found as a matter of fact that High's counsel rendered effective assistance, as do we." High, 300 S.E.2d at 658, app. at 5.

REASONS FOR GRANTING THE WRIT

For the reasons which follow, this Court should issue a writ of certiorari to review the decision of the Supreme Court of Georgia.

I. THIS COURT SHOULD REVIEW THE DECISION BELOW TO DECIDE WHETHER THE INFLICTION OF THE DEATH PENALTY ON A CHILD UNDER THE AGE OF 18 AT THE TIME OF THE OFFENSE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Petitioner was 17 years old at the time of the commission of the offense for which he was sentenced to die. In light of the "evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958), petitioner claims that the state of Georgia should be precluded by the Eighth and Fourteenth Amendments to the

United States Constitution from inflicting the penalty of death upon a child under the age of 18 at the time of the offense.

This Court on at least two previous occasions has granted certiorari to consider a similar question. Eddings v. Oklahoma, 455 U.S. 104 (1982); Bell v. Ohio, 438 U.S. 637 (1978). On both occasions this Court reserved ruling on this issue. Rather, the death sentence in each case was set aside due to a violation of Lockett v. Ohio, 438 U.S. 586 (1978). Eddings, 455 U.S. at 110, n. 5; Bell, 438 U.S. at 642 n.[1/]

It is clear, of course, that the Eighth Amendment does place substantive limits on the state's power to impose a sentence disproportionate to the severity of the offense in a non-capital context. See Soler v. Helms, U.S. (June 28, 1983). In capital cases, too, the Eighth Amendment may prohibit the imposition of death as cruel and unusual punishment for certain offenses. Coker v. Georgia, 433 U.S. 584 (1977). In Coker, this Court determined that the death penalty could not be carried out against rapists because it was excessive and grossly out of proportion to the crime. In determining whether the punishment of death for rapists was excessive, this Court looked to objective factors such as "public attitudes concerning a particular sentence, history and precedent, legislative attitudes and the response of juries reflected in their sentencing decisions." Id. at 592.

Universally, state statutes and policies protect juveniles from adult criminal court proceedings. Most states

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[1/] The statement by the Supreme Court of Georgia implying that Eddings stands for the proposition that it is not per se cruel and unusual punishment for a minor at the time of the offense to be sentenced to death, 300 S.E.2d at 662, app. at 9, therefore, is inaccurate.

have set an absolute minimum age precluding a waiver procedure of the juvenile to adult court. Juvenile laws, unlike adult laws, are rehabilitative in nature. The minor offender is not considered to be wholly responsible for his actions and a focus on rehabilitation instead of punishment is deemed appropriate. See Kent v. United States, 383 U.S. 541 (1966).

Further, in nearly one-half of the states that presently have capital punishment statutes in effect, the respective legislatures have mandated either that death may not be inflicted on a youth under a certain age or that age of the defendant be considered a mitigating circumstance. The defendant's youth, then, is recognized throughout the states as an important, if not decisive, mitigating factor in capital cases.

The actual imposition of the death penalty upon children has become so rare in this country as to be practically nonexistent. The most recent child execution occurred in 1948. W. Bowers, Executions in America (Lexington, Mass. 1974). Recent historical surveys show that the execution of persons under the age of 20 is also becoming rare. Prior to 1950, 229 teenagers were executed (out of 2,678 executions with available age data.) Since 1950, only 26 teenagers have been executed (out of 450 executions with available age data.) Id.

The international community has condemned executions of children as well. The International Covenant on Civil and Political Rights, ratified by 73 nations, provides that a "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age ..." Part III, Article 6, Clause 5. The Covenant was signed by President Jimmy Carter on October 5, 1977. In reserving the right of the United States

to impose capital punishment, the State Department noted that the "[purpose of the reservation] was certainly not the preservation of any right to execute children ..., something never done in the United States." International Human Rights Treaties: Hearings before the Senate Foreign Relations Comm., 96th Cong., 1st Sess. 55 (1979).

The gross disproportionality of executions of the young is evidenced by legislative pronouncement in juvenile laws and in the recognition of the importance of youth in capital cases, as well as the actual rarity of and international attitudes toward child executions. The Eighth Amendment should be construed to eliminate from the face of this country any notion that we execute our children. It is cruel because of the unique manner in which this country historically has treated juvenile offenders and it is unusual because of its rarity in practice and its widespread condemnation. This Court should grant certiorari and settle this issue once and for all.

II. THIS COURT SHOULD REVIEW THE DECISION BELOW TO DECIDE WHAT STANDARD OF COMPETENCY OF COUNSEL IS CONSTITUTIONALLY REQUIRED IN CAPITAL CASES.

This Court should issue a writ of certiorari to decide a question of fundamental importance to the administration of criminal justice in both state and federal courts: what standard of competency of defense counsel is required in capital cases in order to satisfy the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In two other cases docketed this term, this Court has granted certiorari on very similar questions concerning the the standards for evaluating claims of ineffective assistance

of counsel.[2] Petitioner requests that this Court grant certiorari and set the case down for oral argument in tandem with Strickland and Cronic, or, alternatively, defer consideration of this case pending issuance of opinions in Strickland and Cronic.

Although this Court has observed that the Sixth Amendment's right to counsel includes the right to effective assistance "within the range of competence demanded of attorneys in criminal cases[]," McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970), it left determination of this range of competence to the "good sense and discretion of trial courts." Id.

The Supreme Court of Georgia, in deciding petitioner's claim of ineffective assistance of counsel, applied the standard it had previously adopted[3] and which is utilized by the United States Court of Appeals for the Fifth Circuit:[4]

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[2] Strickland v. Washington, 693 F.2d 1243 (11th Cir. 1982) (en banc), cert. granted, 33 Cr. L. Rep. 4073 (U.S. June 6, 1983) (question presented whether court of appeals, in expressly overruling Florida Supreme Court and expressly rejecting en banc opinion of another federal court of appeals, United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1976), cert. denied, 444 U.S. 944 (1979), applied correct standard for review of claims of ineffective assistance of counsel).

United States v. Cronic, 675 F.2d 1126 (10th Cir. 1982), cert. granted, 75 L.Ed.2d 430, 32 Cr. L. Rep. 4193 (February 22, 1983) (question presented whether court of appeals correctly reversed defendant's convictions on ground that he did not receive effective assistance of counsel at trial, without identifying any act or omission by counsel that departed substantially from what reasonably competent criminal defense attorney would have done under circumstances and without finding any prejudice to defendant).

[3] Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974).

[4] MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961).

counsel reasonably likely to render and rendering reasonably effective assistance. This standard appears to be in conflict with the standard set forth by the Eleventh Circuit -- the Circuit in which Georgia is located -- in Washington v. Strickand, which requires a habeas petitioner to demonstrate that counsel's ineffectiveness "worked to his actual and substantial disadvantage." 675 F.2d at 1258.

The Georgia standard and the Washington v. Strickland standard are but two of several standards which are applied in determining the adequacy of counsel under the Sixth Amendment.[5/] There is conflict in the Circuits and conflict among the states. Some jurisdictions find counsel's ineffectiveness to violate the Sixth Amendment only if the incompetence rendered the proceedings a "farce and mockery of justice."[6/] The inquiry in other jurisdictions has been whether there was "gross incompetence of counsel which in effect blotted out the essence of a substantial defense,"[7/] whether counsel has exercised the "skill, judgment and diligence of a reasonably competent defense attorney,"[8/] whether the accused was represented by a "reasonably competent attorney acting as a diligent conscien-

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5/ See Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am. Cr. L. Rev. 233 (1979).

6/ See Slayton v. Weinberger, 213 Va. 630, 194 S.E.2d 703 (1974); Erickson, supra at 239 n. 53.

7/ Johnson v. United States, 413 A.2d 499, 504 (D.C. App. 1980).

8/ Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980); State v. Orona, 638 P.2d 1077 (N.M. 1982).

tious advocate,"[9] or whether there has been "serious incompetency" that falls "measurably below the performance ordinarily expected of fallible lawyers" that "likely" affected the outcome of the trial.[10]

As noted, this case presents policy questions pertaining to the proper standard for the effective assistance of counsel similar to those presented in Strickland. Certiorari should be granted, therefore, to ascertain whether the Supreme Court of Georgia applied the proper standard in evaluating counsel's competency under the Sixth Amendment. Yet, a refinement of the question is presented here: that is, does the Eighth Amendment require a more strict standard in assessing counsel's competency in death penalty cases?

The penalty phase of a capital trial is a distinct proceeding where the jury's attention is focused not just upon the circumstances of the crime, but also on "special facts about this defendant that militate against imposing capital punishment." Gregg v. Georgia, 428 U.S. 153, 197 (1976) (Stewart, Stevens, Blackmun, Powell, J.J.). If petitioner's trial counsel cannot be considered ineffective at sentencing under the Georgia standard despite counsel's wholesale failure to investigate and present mitigation evidence, then it would seem appropriate for this Court to establish that in capital cases, the Eighth Amendment, together with the Sixth

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[9] Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978); People v. Poe, 23 Cal.3d 412, 423, 590 P.2d 859, 865, 152 Cal. Rptr. 732, 738 (1979).

[10] United States v. DeCoster, 624 F.2d at 206 (opinion of Leventhal, J.).

and Fourteenth, impose a high standard of reasonableness and require that a convicted defendant's counsel be subject to strict scrutiny.

Indeed, this heightened scrutiny of defense counsel's services is one of the very conditions under which this Court has allowed capital punishment to be imposed. There is a qualitative difference between death and life imprisonment, and a corresponding difference in the need for reliability in the jury's determination that death is the appropriate punishment in a specific case. Woodson v. North Carolina, 428 U.S. 280 (1976). This necessary reliability is undermined in the absence of a strict and demanding review of defense counsel's performance.

A discussion of trial counsel's failure to develop and present effective and available mitigation evidence demonstrates the need for the application of Eighth Amendment principles to the question of counsel's competence. Petitioner's counsel presented no evidence whatsoever at the sentencing phase of the trial. Petitioner presented at his habeas corpus hearing some of the evidence which could have been presented had he been represented by competent counsel. Petitioner demonstrated through the affidavits of 16 persons that there were numerous witnesses who could have testified at sentencing had counsel conducted any investigation.

Counsel's description of the "investigation" he undertook showed his lack of understanding and lack of diligence. He did not assign anybody from his office to develop mitigation evidence and directed his legal assistants only to interview police officers. Habeas Corpus Hearing Transcript 23.[11/]

11/ Hereinafter referred to as "HCTr."

He did not talk with anyone about the possibility of testifying at the sentencing, id. 24, even though he personally knew several of the persons who offered affidavits at the habeas hearing, including Dennis Wilds, a former principal of petitioner's, who described petitioner as a "very conscientious student," hctr. 73, and Constance Evans, petitioner's high school guidance counselor at the time of offense. Ms. Evans described Jose as a "very pleasant person ... well liked by his peers ..., a gentle person ... he never showed any cruelty to others." HCTr. 44.[12/]

It is clear from counsel's testimony both that he was not aware of what the law and procedures were pertaining to mitigation hearings and that he failed to make a diligent effort to find such witnesses. He testified that the "the law was in somewhat of a state of flux[13/] with regard to the bifurcated procedure. And we were feeling our way at the time." HCTr. 14, 23. Counsel simply did not know that he had a duty to make a search for witnesses with knowledge of petitioner's high school background, character, family situation and record which might mitigate punishment.

12/ Ms. Evans also stated: "Jose could be quite considerate and quite generous. He gave me flowers once stating that he appreciated me because I took time out for him and would talk to him about his feelings and problems. I remember him giving me candy too ... Jose appeared to be a person lost and crying out for help and attention. He knew he had a lot to give but no one seemed to ask for it. He did not have a mean personality and certainly should be given a chance to rehabilitate himself. He needs to be placed in a situation where he will receive the structured professional help he needs, and not a death sentence." HCTr. 45.

13/ Rather, this Court had stated months before the penalty phase of this trial in Lockett v. Ohio, 438 U.S. 586, 604 (1978), that the sentencer may not be "precluded from considering as a mitigating factor, any aspect of a defendant's character or record ..."

Counsel never even discussed with petitioner's parents the possibility of testifying at sentencing nor did he request that they provide him with a list of persons who could be interviewed as potential sentencing witnesses. Id. 24-25. Counsel was not aware of friends and neighbors of petitioner who were available to inform the jury of a number of positive character traits. Next door neighbor, Jeanette Page, hctr. 63, described petitioner as a nice fellow and good neighbor. He would help out around his parent's home and she remembered him helping her by giving her dead battery a boost. Josephine Daniel, who lived next door to petitioner, described him as a "polite, ... normal, regular teenager." HCTr. 40. He was often at her house and she considered him "like one of the family." Id.

Similarly, counsel did not remember talking with anyone at petitioner's high school, Richmond Academy, nor reviewing any school records, hctr. 28-29, nor did he even inform the jury that petitioner was 17 years old and a student at the time of the offense. Readily available evidence submitted at the habeas hearing demonstrated that petitioner was an 11th grade student at Richmond at the time of his arrest in 1979. The racial friction at Richmond was acute at that time and he found himself in the center of controversy. Eleanore Hoernle, petitioner's homeroom teacher, described him as ready witted, the object of attention and in a state of conflict with some of his teachers. "[H]is teachers that year seemed to range from indifferent to hostile." HCTr. 58. She described him as a proud black youngster with little experience with sympatheic white adults and needing a great deal of guidance.

> Jose was desperate for attention and definitely begging for psychological counseling but we didn't even have a school psychologist.

HCTr. 60.

Petitioner was well remembered by a number of his teachers. World history teacher Terry Elam stated that in one assignment petitioner "demonstrated an extraordinary sense of responsibility that you just don't see." HCTr. 41-42. In the spring before petitioner's arrest, Mr. Elam noticed "significant positive change," and he comments that "[o]ther teachers also expressed shock and delight to me at his positive development." Id.

It is also clear that counsel was completely ignorant of petitioner's church activity and attendance. Marie Freeman, however, relates that petitioner and his family were regular church goers at the Hickman Tabernacle Church in Augusta. HCTr. 49-50. He was still going to church the summer of his arrest. She describes him as a "fine boy and I never knew him to do anything bad." Id. Further, counsel never informed the jury of petitioner's work history at his father's store nor at the Reid service station and funeral home even though evidence of that history was readily available. HCTr. 51-43, 61-65.

Counsel simply expended no effort in preparing for the sentencing phase of petitioner's trial. Counsel quite candidly stated that there was no tactical reason for not presenting any mitigation evidence. HCTr 33. As noted, in Lockett, this Court reaffirmed that for the sentencer to make an individualized decision of the appropriateness of death as punishment, the sentencer must be allowed to consider all available mitigation evidence. This Court reasoned that preventing the sentencer from giving independent weight to such

factors creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

In sum, petitioner's jury was not provided with any information whatsoever concerning him except his conduct surrounding the crime. His jury was not remotely aware of his familial relationship, his positive dealings with friends and neighbors, his work habits, his successes and problems in school, his church activity, nor the love of his parents. The jury did not even know the age of the child upon whom it inflicted death. Petitioner's sentence of death, then, was imposed without any consideration of his life and circumstances.

The Georgia standard for ineffective assistance of counsel obviously is not sensitive to this fundamental error. This Court should review this case to decide whether Eighth Amendment principles govern a determination of counsel's competence in a capital case, and the constitutionally required standard for deciding claims of ineffective assistance of counsel.

CONCLUSION

For the reasons stated herein, Jose Martinez High requests that a writ of certiorari issue to review the decision of the Court below.

Respectfully submitted,

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the trustees need not exercise ordinary diligence. That, it seems to me, was precisely what he was paying them to do, at a minimum. No doubt he hoped for more. No doubt he hoped for sagacity, minute and constant attention, and even a measure of luck. But he did not strike a bargain entitling him to that. No doubt he could not have struck such a bargain. Nor, in my opinion, could the trustees have struck the bargain which the majority opinion credits them with. Whether they *could* have is not, of course, the question. The question is whether they clearly and unambiguously did, and I submit that they did not—and that we effect an injustice when we determine the settlor's intent as a matter of law and disallow the beneficiaries the simple right to try to establish a lack of ordinary diligence. I therefore respectfully dissent.

I am authorized to state that SMITH, J., joins in this dissent.

HIGH

v.

ZANT.

No. 39371.

Supreme Court of Georgia.

March 1, 1983.

Following denial of writ of habeas corpus in the Superior Court, Butts County, Sam L. Whitmire, J., certificate of probable cause was granted to consider contentions of petitioner, who had been convicted of murder, two counts of kidnapping, armed robbery, possession of firearm during commission of crime, and aggravated assault. The Supreme Court, Weltner, J., held that: (1) trial defense counsel rendered effective assistance; (2) trial court did not err in excluding from guilt-innocence phase of trial jurors who stated that they were conscientiously opposed to imposition of death penalty; (3) trial court did not err in denying motion for change of venue; (4) petitioner was not denied right to speedy trial; (5) trial court did not err in admitting incriminating custodial statements of petitioner; (6) petitioner was not entitled to state-paid assistance at habeas corpus hearing; (7) trial court's jury instructions were not improperly burden-shifting; (8) prosecutor's remarks during jury summation in guilt-innocence phase of trial did not constitute prejudicial error; (9) prosecutor's remarks during jury summation in sentencing phase of trial were not improper; (10) death penalty was not excessive punishment under circumstances; and (11) electrocution is not cruel and unusual punishment.

Judgment affirmed.

1. **Criminal Law** ⇐641.13(7)

Defendant was not denied effective assistance of counsel by reason of failure of defense counsel, during sentencing phase of trial, to call witnesses whose testimony would essentially have been that defendant was normal teenager, in view of brutal and monstrous manner in which defendant carried out kidnapping of gas station attendant and attendant's 11-year-old stepson and subsequent murder of stepson. U.S.C.A. Const.Amend. 6.

2. **Habeas Corpus** ⇐85.3(1)

Habeas corpus court did not err in refusing to admit into evidence two affidavits in support of petitioner's claim of ineffective assistance of counsel, in view of fact that affidavits were not timely served upon state, and, even if they were properly in evidence, they were merely cumulative of other evidence which was considered and rejected by habeas corpus court. O.C.G.A. § 9-14-48(c).

3. **Jury** ⇐108

Trial court did not err in excluding from guilt-innocence phase of defendant's

trial jurors who stated that they were conscientiously opposed to imposition of death penalty, and particularly, juror who stated that, while she could consider capital punishment along with other possible punishments, she could never impose it, under any circumstances. U.S.C.A. Const.Amend. 6.

4. Jury ⇐131(17)

In examining prospective juror, counsel for accused should not ask technical legal questions in regard to presumption of innocence, but should confine his questions to those which may illustrate any prejudice of juror against accused, or any interest of juror in the cause.

5. Jury ⇐103(1)

Though four prospective jurors had heard about case at time of killing and indicated that they had opinions either as to defendant's guilt or as to punishment, there was no error in failing to excuse jurors for cause, in light of responses by all jurors that they could subordinate their opinions to evidence and law as charged by court. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐126(2)

Trial court did not abuse its discretion in denying motion for change of venue, in view of remoteness of publicity surrounding homicide, and successful empanelment of jury, none of whom had fixed opinions as to guilt or innocence of defendant or as to punishment.

7. Criminal Law ⇐577.10(8, 10)

Defendant was not denied right to speedy trial, though trial began more than two years after his arrest, in view of fact that delay was attributable to defendant's twice having successfully challenged composition of grand juries which indicted him, and in absence of timely demand by defendant for trial and showing of particular prejudice to defendant resulting from delay. O.C.G.A. § 17-7-171; U.S.C.A. Const. Amend. 6.

8. Criminal Law ⇐414

Evidence adduced at *Jackson-Denno* hearing, relative to custodial statements by defendant, was sufficient to support trial court's ruling as to voluntariness, and statements were properly submitted to jury with full instructions as to their admissibility. U.S.C.A. Const.Amend. 5.

9. Criminal Law ⇐1110(1)

Where transcript or record does not fully disclose what transpired at trial, burden is on complaining party to have record completed in trial court, and when this is not done, there is nothing for appellate court to review. O.C.G.A. § 5-6-41(f).

10. Habeas Corpus ⇐116

It was not error to deny state-paid assistance to defendant at habeas corpus hearing. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐778(5)

Trial court's instructions to jury, setting forth rebuttable presumptions that person intends natural and probable consequences of his act and that person using deadly weapon intends to kill, were not improperly burden-shifting, in view of language elsewhere in charge that persons are not presumed to act with criminal intention, that burden was on state to prove alleged act beyond reasonable doubt, and that defendant entered trial with presumption of innocence.

12. Habeas Corpus ⇐113(12)

To constitute reversible error in habeas corpus proceeding, alleged prosecutorial misconduct must be so prejudicial as to render trial fundamentally unfair in violation of due process. U.S.C.A. Const.Amend. 14.

13. Criminal Law ⇐719(1), 1171.3

Reference by prosecutor in jury summation to defendant's incriminating statements, which were not admitted into evidence and which implicated defendant in other crimes, was improper, being impermissible introduction of facts not in evidence, as distinguished from false logic or rhetoric; however, such error was not prejudicial, in view of overwhelming evidence against defendant and in absence of objection by defendant to statements when they were made so as to permit curative jury instructions. O.C.G.A. § 24-2-2.

14. Criminal Law ⇐721(4)

Remarks by prosecutor during jury summation, to effect that defendant had shown no remorse, from time of murder of 11-year-old boy until time of sentencing phase in criminal prosecution, were not comments which improperly asked jury to infer guilt from defendant's failure to testify, but, rather, asked jury to infer lack of remorse.

15. Criminal Law ⇐722(2)

Remarks by prosecutor during jury summation in sentencing phase of murder prosecution, referring to defendant's conduct as "vicious, mean, lowdown, unlawful, illegal," and "immoral," did not constitute error, in view of fact that jury had already found defendant to be guilty, and prosecutor's characterization of defendant's conduct was accurate.

16. Criminal Law ⇐1213

Imposition of death penalty is not cruel and unusual punishment per se, simply because defendant was minor at time of offense. U.S.C.A. Const.Amend. 8.

17. Criminal Law ⇐796

Instruction given in kidnap murder prosecution, to effect that jury was authorized to consider all facts and circumstances, "including mitigating facts and circumstances, if any, on behalf of defendant," and that jury could recommend life sentence even if it found aggravating circumstances, was not insufficient under sentencing statute, notwithstanding that direction to consider mitigating circumstances was not expressed in mandatory terms and that term "mitigating circumstances" was not defined for jury. O.C.G.A. § 17-10-30(b)(7).

18. Criminal Law ⇐996(1.1)

Where, in prosecution for armed robbery, kidnapping, and murder, after jury found aggravating circumstances present as to each count and recommended death penalty, Supreme Court ordered reduction of sentence as to two counts, defendant was not entitled as well to resentencing on other counts, in view of fact that jury was instructed to, and did, focus independently on each count in fixing penalty for that count. O.C.G.A. § 17-10-30(b)(7).

19. Homicide ⇐354

In view of evidence that defendant was not merely aider and abettor to murder of victim, but, rather, was "ringleader" in execution-style killing of 11-year-old boy, death penalty was not excessive. U.S.C.A. Const. Amend. 8.

20. Criminal Law ⇐1213

Electrocution is not cruel and unusual punishment, as compared to other possible methods of carrying out death penalty. U.S.C.A. Const.Amend. 8.

Joseph Nursey, Atlanta, Bradley S. Stetler, Graber, Stetler & Townsend, Alexandria, Va., Stephen B. Bright, D.C. Law Students in Court, Washington, D.C., for Jose Martinez High.

Virginia Jeffries, Asst. Atty. Gen., for Walter D. Zant, Warden.

WELTNER, Justice.

We granted a certificate of probable cause to consider High's contentions on writ of habeas corpus. For the factual background of the case see *High v. State*, 247 Ga. 289, 276 S.E.2d 5 (1981), where this Court affirmed the imposition of the death penalty; *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52 (1981); and *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979), where we affirmed death sentences imposed upon High's co-actors.

[1] 1. High's principal contention, along with 24 other enumerations of error, is that he was denied effective assistance of counsel in that no witnesses were called on his behalf during the sentencing phase, notwithstanding his post-trial showing of the availability of witnesses who, *after the trial*, indicated their willingness to come forward in his aid.

His counsel, a member of the Bar for many years and a lawyer possessing wide experience in the defense of criminal cases, including capital cases, testified before the

habeas corpus court that he and two assistants made an effort to locate witnesses, and inquired of High as to the availability of witnesses—without avail, either from their own investigation or from suggestions put forward by High. He further stated that he had determined not to call High's parents for fear that their distress might be perceived by the jury to be feigned.

In support of his contention, High presented to the habeas corpus court a series of affidavits from family, friends, neighbors, and former teachers, several of which are excerpted as follows:

"A gentle person . . he never showed any cruelty to others." "Jose could be very considerate and quite generous. He gave me flowers once stating that he appreciated me because I took time out for him and would talk to him about his feelings and problems. I remember him giving me candy too . . ." "Jose was desperate for attention and definitely begging for psychological counseling but we didn't even have a school psychologist."

Other affidavits showed that High was "a nice fellow and good neighbor," that he once helped a neighbor start a car, and that he cut the grass and took care of the dogs at his parents' home; that he was "polite," and a "normal regular teenager."

Having presented these affidavits, High contends that his counsel, in failing to produce at the trial equivalent testimony, was of necessity ineffective, notwithstanding counsel's relation of the matter.

Lest the total circumstance within the courtroom be overlooked at this remove, we quote from *High*, supra, at p. 297, 276 S.E.2d 5: "The appellant showed no remorse for the killing, but rather bragged that 'he wanted to be the most famous black ringleader in the world.' Under the evidence of this case, there is no doubt that the kidnapping and murder were of the type universally condemned by civilized societies as outrageously or wantonly vile or inhuman."

In our opinion affirming the conviction and death sentence of High's co-defendant, *Ruffin v. State*, supra, there appears at page 95, 252 S.E.2d 472 the following summation of fact: "In the late evening hours of July 26, 1976, Henry Lee Phillips was operating an Amoco service station off I-20 near Crawfordsville, Georgia, with his eleven-year-old stepson, Bonnie Bulloch, helping him. A car pulled into the station with three occupants. The appellant and the two co-indictees, Nathan Brown and Jose High, were in the car. The car had been in the station a week or two earlier. The three men got out of the car and one pointed a pistol at Phillips. Appellant had a sawed-off shotgun. Phillips was forced to leave the booth while the appellant removed the money from the register and demanded any other money. When Phillips told him that there was no more money, the appellant grabbed Bonnie Bulloch and told Phillips to get in the car trunk or Phillips and the boy would be killed.

"Phillips got in the trunk of the car and when he was released from the trunk found that they were in the woods. Phillips and his stepson were ordered to lie on the ground. Phillips then heard shots fired. When Phillips regained consciousness he discovered that Bulloch was dead. In his confession, the appellant stated that he shot the boy in the head while his cohorts also shot at the victims. Phillips had been shot in the temple and wrist. He managed to get to a nearby house and the sheriff was summoned."

In viewing the contention of ineffectiveness of counsel, we cannot consider potential mitigation evidence *in vacuo*, any more than the trial jury might blot out what they have seen and heard for several days in the guilt phase, once they turn to consider sentence. Here, the jury learned of the execution-style killing of an eleven year-old child, whose only offense against High was that he was present when High and his companions robbed a service station, thereby committing the crime of becoming an involuntary witness. Here, the jury was exposed to the tragic death of a little boy, shot through the head after High had continued to ask and assure him "Are you ready to die? Do you want to die? Well, you're

going to die." *High*, supra, at p. 296, 276 S.E.2d 5. Here, the jury learned of a small child removed from a car, marched around the front of an automobile and forced to lie upon his face, as three murderers snuffed out his life. Here, the jury heard of High bragging that "he wanted to be the most famous black ringleader in the world."

Up against that, High's counsel is charged with derogation of duty in failing to call someone who would mount the stand to say that Jose was a normal teenager, or that he never talked to a school psychologist.

In the face of the monstrosity of what High did to eleven year-old Bonnie Bulloch, we can easily understand the decision of an *experienced* defense lawyer who sees, with us, the hazard of deigning to present such transparencies.

The habeas corpus court found as a matter of fact that High's counsel rendered effective assistance, as do we.

[2] 2. High contends that the habeas corpus court erred in not admitting into evidence two affidavits in support of his claim of ineffective assistance. This contention is without merit, as the affidavits were not served upon the State five days in advance of the day set for hearing, as required by OCGA § 9-14-48(c). Nevertheless, we have considered the affidavits and conclude that, even if they were properly in evidence, our holding in Division 1 would not be affected, as they are merely cumulative of other evidence which was considered by the habeas corpus court.

[3] 3. It was not error to exclude from the guilt-innocence phase of High's trial jurors who stated that they were conscientiously opposed to the imposition of the death penalty. *Smith v. Balkcom*, 660 F.2d 573, 578 (5th Cir.1981).

In particular, it was not error, under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1966), to exclude a juror who stated that, while she could consider capital punishment along with other possible punishments, she could never impose it, under any circumstances. See *High*, supra, at p. 291, 276 S.E.2d 5.

4. High contends that the trial court erred in failing to excuse for cause six jurors alleged to have preconceived notions of petitioner's guilt or the penalty to be imposed.

High argues that two of the jurors should have been excused due to their failure to understand the presumption of innocence in favor of the defendant. Neither juror actually served on the jury which convicted High. The basis for High's contention may be illustrated by excerpting a portion of the voir dire examination of juror Warren Johnson by defense counsel:

"Q. You would require the defendant to put up some evidence to prove he's innocent?

"A. I'd want to hear both sides.

"Q. And you'd have to hear both sides before you could return a verdict of not guilty?

"A. Yes."

Mr. Johnson subsequently stated that his mind was perfectly impartial between the State and the accused, that he would want to hear "all the evidence," and that he could return a verdict of guilty or not guilty whether the defendant put up any evidence or not.

[4] "In examining a prospective juror, counsel for the accused should not ask technical legal questions in regard to the presumption of innocence, but should confine his questions to those which may illustrate any prejudice of the juror against the accused, or any interest of the juror in the cause." *McNeal v. State*, 228 Ga. 633(3), 187 S.E.2d 271 (1972). The questions proffered were improper, and the responses thereto were not grounds for excusing the jurors. Additionally, the layman generally conceives of a court as a tribunal where "both sides" will be heard.

[5] High contends that four jurors should have been excused for cause due to fixed opinions as to guilt-innocence or punishment. A review of the voir dire examination of these jurors reveals that all four

had heard about the case at the time of the killing. One indicated that he had an opinion as to the guilt or innocence of High, but that he could subordinate that opinion to the evidence and the law as given by the court. The others, one of whom served on the convicting jury, indicated that they had opinions as to punishment, but that, again, their opinions could be subordinated to the evidence and the law as charged by the court. As none of the jurors had fixed opinions as to guilt-innocence or punishment, this contention must fail.

High's contentions relative to sequestration of the jury and the oral denial of a Brady motion in the presence of the jury have been considered and rejected on direct appeal. *High*, supra, pp. 291–2, 276 S.E.2d 5.

5. We held previously that the application of the peremptory strike statute, former Code Ann. § 59–905, in this case did not result in a denial of due process to High. *High*, supra, at p. 289, 276 S.E.2d 5.

6. It was not error to deny State-paid expert assistance to High at trial. *High*, supra, at p. 289, 276 S.E.2d 5.

[6] 7. High contends that the trial court erred in denying his motion for a change of venue. In support thereof, High introduced thirteen newspaper articles, all published on or about the time of the killing, some two years prior to trial. We have reviewed carefully the voir dire examination of each juror who sat on the convicting panel, and conclude that, although all but one had at least heard about the case at the time of the killing, none had fixed opinions as to the guilt or innocence of High or as to punishment. In view of the remoteness of the publicity surrounding the case and the successful empanelment of an unbiased jury, we conclude that the trial court did not abuse its discretion in denying the motion for a change of venue. *Coleman v. State*, 237 Ga. 84(1), 226 S.E.2d 911 (1976).

[7] 8. High contends that he was denied his right to a speedy trial, under the sixth amendment to the U.S. Constitution. Applying the four-factor test adopted in *Haisman v. State*, 242 Ga. 896(2), 252 S.E.2d 397 (1979), we conclude that no constitutional violation occurred.

High's trial began in November, 1978, more than two years after his arrest in August, 1976. This delay was attributable to High twice having challenged successfully the composition of the grand juries which indicted him. High does not allege that any demand for trial was made prior to his motion to dismiss, made on the first day of trial. See OCGA § 17–7–171. Finally, High does not allege any particular prejudice resulting from the delay. Based upon these factors, we conclude that the delay between arrest and trial did not amount to an error of constitutional proportions.

9. High contends that the trial court erred in allowing the introduction of evidence seized as a result of an allegedly illegal stop and arrest. This contention has been considered and rejected by our courts. *High*, supra, at p. 295, 276 S.E.2d 5, citing *State v. High*, 145 Ga.App. 772, 244 S.E.2d 888 (1978).

[8] High contends that the admission of incriminating statements made to police while in custody violated the procedural requirements of *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). The trial court held a Jackson-Denno hearing, heard evidence concerning the circumstances surrounding the giving of the statements, and specifically ruled that they were freely and voluntarily made. The statements were then submitted to the jury with full instructions as to their admissibility. The ruling of the trial court as to voluntariness is supported by the evidence. The procedure followed was not subject to the defects disapproved in *Jackson v. Denno*, supra, at pp. 377–91, 84 S.Ct. at pp. 1781–88.

10. High contends that certain evidentiary rulings denied him a fair trial. High fails to point out where these rulings occurred. Nevertheless, we note that we already have considered allegations relative to the disclosure of evidence unfavorable to High, the enforcement of a sequestration

order, the admission of evidence concerning High's co-defendants and the admission of certain tire track evidence. See *High*, supra, at divisions 5, 8 and 9. We have considered other evidentiary rulings complained of, including the alleged failure of the trial court to instruct the jury to disregard certain testimony, and find no error.

[9] 11. High contends that he was denied a fair trial due to the failure of the court reporter to transcribe bench conferences. The trial court granted a motion for complete recordation "insofar as the law requires." Where the transcript or record does not fully disclose what transpired at trial, the burden is on the complaining party to have the record completed in the trial court under the provisions of OCGA § 5–6–41(f). When this is not done, there is nothing for the appellate court to review. *Zachary v. State*, 245 Ga. 2, 4, 262 S.E.2d 779 (1980).

[10] 12. It was not error to deny State-paid assistance to High at the habeas corpus hearing. *Harris v. Hopper*, 243 Ga. 244, 253 S.E.2d 707 (1979).

[11] 13. High contends that the trial court's instructions to the jury as to intent were burden-shifting, in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).[1]

In defining a "crime," the trial court charged the jury as follows: "A *crime* is a violation of a statute of this State in which there shall be a union of joint operation of act and intention. I charge you that the acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted. I charge you that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but the presumption may be rebutted. I charge you that a person will not be presumed to act with criminal intention, but the trior of the facts may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted." Subsequently, after defining the crime of murder, the court gave the following instruction: "I charge you, ladies and gentlemen of the jury, that the law presumes that a person intends to accomplish the natural and probable consequences of his act or acts if that person uses a deadly weapon or instrumentality in the manner in which such weapon or instrumentality is ordinarily employed to produce death and thereby causes the death of a human being. The law presumes the intent to kill. This presumption may be rebutted. I further charge you that a person shall not be presumed to act with criminal intention but the triors of the facts may find such intention upon consideration of the words, conduct, demeanor, and all other circumstances connected with the act for which the accused has been prosecuted. The burden is upon the State to prove the act alleged to be criminal is, in fact, a criminal act beyond a reasonable doubt."

High enumerates as error only the latter portion of the charge. We will review both.

In the first excerpted portion the court essentially charged a rebuttal presumption that a person of sound mind and discretion intends the natural and probable consequences of his act. In the second portion, the court charged that where a person uses a deadly weapon in the ordinary manner and death results, the law presumes the intent to kill, but this presumption may be rebutted.

Taken alone, this language, while not creating conclusive presumptions, might be considered burden shifting, in violation of *Sandstrom*, supra. However, this language must be considered together with the court's instruction, twice repeated, that a person "shall not be presumed to act with criminal intention but the triors of the facts may find such intention upon consideration of the words, conduct, demeanor, and all other circumstances connected with the act for which the accused has been prosecuted." And the court stated that "[t]he burden is

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upon the State to prove the act alleged to be criminal is, in fact, a criminal act beyond a reasonable doubt." The court charged that intent is an element of the crime and that the burden is on the State to prove every element beyond a reasonable doubt. Finally, the court instructed the jury as to the presumption of innocence no less than five times, including the following: "I charge you that the defendant enters into the trial of this case with the presumption of innocence. The presumption of innocence is affirmative proof in behalf of one accused of a crime and places upon the prosecution the burden of rebutting it by proof which shall satisfy the jury of the defendant's guilt beyond a reasonable doubt. The presumption of innocence refers to a substantive right which is in the nature of evidence."

Taking the charge as a whole, we conclude that no reasonable juror could have understood it to mean that any burden whatsoever was placed upon the defendant with respect to the elements of the crimes charged. The language employed merely created a permissive inference with respect to intent, and we find no reversible error *Johnson v. State*, 249 Ga. 621(1), 292 S.E.2d 696 (1982); *Hosch v. State*, 246 Ga. 417(3), 271 S.E.2d 817 (1980).

[12] 14. High complains of remarks made by the prosecutor during his summation to the jury in the guilt-innocence phase of the trial. They include references to the defendant as subhuman and the invoking of religious beliefs and familial sympathies. The habeas corpus court correctly concluded that these remarks constitute "...conduct which is merely improper and universally condemned but not a denial of due process." *Easter v. Estelle*, 609 F.2d 756, 760 (5th Cir.1980). To constitute reversible error in a habeas corpus proceeding, the alleged misconduct must be "...so prejudicial as to render a trial fundamentally unfair in violation of the due process clause." Id.

[13] A more serious problem is presented by the prosecutor's reference to portions of High's incriminating statements which were not admitted into evidence and which implicated High in other crimes. See OCGA § 24-2-2. This amounted to an impermissible introduction of facts not in evidence, as distinguished from false logic or rhetoric. See *Powell v. State*, 179 Ga. 401(4), 176 S.E. 29 (1934); *Houston v. Estelle*, 569 F.2d 372, 376-84 (5th Cir.1978). However, defense counsel made no objection to these remarks, although he did object to other portions of the closing argument, and thus the trial court had no opportunity to give curative instructions to the jury. See *Whisman v. State*, 221 Ga. 460(7), 145 S.E.2d 499 (1965). In view of the overwhelming evidence against High, including his own incriminating statements and the eyewitness testimony of a victim who survived an attempt on his life, we conclude that it is highly probable that the error did not contribute to the verdict. *Johnson v. State*, 238 Ga. 59, 60-61, 230 S.E.2d 869 (1976).

[14] High contends that the following remarks, made by the prosecutor in his summation to the jury in the sentencing phase of the trial, constitute improper comment upon the defendant's failure to testify: "You know, if a week or two weeks or three weeks after this cruel and inhumane and defenseless little—this murder on a defenseless little 56 inch, 70 lb. kid—if two or three weeks later they had come in and said, listen, I did it, I'm wrong—maybe God can forgive me and you try. That's one thing. But no—until this very day there has been no remorse shown. There hasn't been one single word that I've heard that has been uttered that this is something that shouldn't have happened." This is not a comment which asked the jury to infer guilt from the defendant's failure to testify (see *Jacobs v. State*, 137 Ga.App. 592(2), 224 S.E.2d 462 (1976)); rather, it asked the jury to infer a lack of remorse. We find no error. *Marshall v. State*, 239 Ga. 101(3), 236 S.E.2d 58 (1977).

[15] Lastly, High complains of allegedly inflammatory remarks by the prosecutor in the sentencing summation. For example, "...I want you to think about a little elev-

en year old boy—a little young fellow who didn't have a chance to live out his life because of the vicious, mean, lowdown, unlawful, illegal, immoral, conduct on the part of this man and two others." Assuming High to be guilty, which the jury had already found, we find this to be an accurate, if ineloquent, assessment of High's deeds. We have reviewed the entire summation and find no error of constitutional dimensions, nor any violation of state law. Compare *Hance v. Zant*, 696 F.2d 940 (11th Cir.1983). See *High*, supra, at p. 295, 276 S.E.2d 5.

[16] 15. The imposition of the death penalty is not cruel and unusual punishment *per se* simply because High was a minor at the time of the offense. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

16. High contends that the imposition of the death penalty was not justified under OCGA § 17–10–30(b)(7) because of a lack of serious physical abuse prior to death. This contention is without merit. *High*, supra, at pp. 296–7, 276 S.E.2d 5.

[17] 17. High contends that the sentence of death must be set aside due to the failure to instruct the jury sufficiently as to the meaning of OCGA § 17–10–30(b)(7). This contention is without merit. *Gilreath v. State*, 247 Ga. 814(16), 279 S.E.2d 650 (1981).

High contends that the trial court's instructions to the jury relative to their consideration of mitigating circumstances in fixing punishment were insufficient, citing *Spivey v. Zant*, 661 F.2d 464 (former 5th Cir.1981). With regard to the jury's decision whether to impose a life sentence or the death penalty, the court gave these instructions: "In reaching this determination, you are authorized to consider all of the evidence received by you in open court in the trial of the case. You are authorized to consider all of the facts and circumstances of the case including mitigating facts and circumstances, if any, on behalf of the defendant.... I charge you, members of the jury, that if you find that the State has proved one or more statutory aggravating circumstances beyond a reasonable doubt that you may recommend that the defendant receive a life sentence."

The sentencing instructions in this case were not subject to the defects disapproved in *Spivey*, supra. In *Spivey*, the jurors were told that they could consider all the facts and circumstances of the case in fixing punishment. Here they were told that they could consider all the facts and circumstances, "... including mitigating facts and circumstances, if any, on behalf of the defendant." In *Spivey*, the jurors were not instructed clearly as to the option to recommend a life sentence even though they might find aggravating circumstances. Here, that option was set forth in unmistakable terms. See *Hawes v. State*, 240 Ga. 327(9), 240 S.E.2d 833 (1978); *Fleming v. State*, 240 Ga. 142(7), 240 S.E.2d 37 (1978).

High contends that the jurors should have been instructed to consider mitigating factors in mandatory terms, i.e., instead of "You are authorized to consider, ..." the court should have said, "You must consider...." While mandatory language might be preferable, we do not believe a reasonable juror could have been misled by this variation. If the language had been construed as purely discretionary, the jurors might have concluded that they could impose the ultimate penalty without considering any of the facts and circumstances. Such a construction is plainly contrary to the reasonable intendment of the charge as a whole, including the requirement that, prior to imposition of the death penalty, the jurors must find the existence of an aggravating circumstance beyond a reasonable doubt.

High also argues that "mitigating circumstances" should have been defined for the jury. Implicit in the charge is a definition of the term, as the court referred to "...mitigating facts and circumstances, if any, *on behalf of the defendant.*" (Emphasis supplied). Thus, even if a juror did not understand the term "mitigating," he or she could have construed it only in its broadest possible sense, to mean *anything favorable*

to the defendant. Any more technical definition might tend unduly to restrict the jury's consideration.

[18] 18. High was originally sentenced to death on four counts, Counts 1 and 4 consisting of the armed robbery and kidnapping of Henry Phillips, who survived, and Counts 3 and 5 consisting of the kidnapping and murder of Bonnie Bulloch. The jury found that the aggravating circumstance set out in OCGA § 17-10-30(b)(7) was present as to each count. On direct appeal, we reversed the imposition of the death penalty as to Counts 1 and 4. *High*, supra, at p. 297, 276 S.E.2d 5. High contends that the jury's consideration of aggravating circumstances as to Counts 3 and 5 may have been infected by their consideration of Counts 1 and 4, and that therefore he should be resentenced as to Counts 3 and 5.

As we have stated previously, this contention relates to the reduction of sentences and not the disallowance of an aggravating circumstance. *High*, supra, at p. 297, 276 S.E.2d 5. The jury was instructed to "...state and set forth the aggravating circumstances which caused you or compelled you to inflict the death penalty as to whatever count or counts you might see fit to inflict such penalty." The court's charge required the jury to focus on each count before fixing the penalty for that count, and we conclude that the reversal of the death penalty as to Counts 1 and 4 does not require resentencing as to Counts 3 and 5.

19. High contends that the kidnapping with bodily injury of Bonnie Bulloch merged with the murder of Bonnie Bulloch, and thus High was improperly sentenced for crimes which merged. We have previously rejected this contention. *High*, supra, at pp. 294-5, 276 S.E.2d 5.

20. High's contention that the death penalty is imposed arbitrarily and in a discriminatory manner in Georgia also must fail. *High*, supra, at p. 295, 276 S.E.2d 5.

21. High contends that the sentence of death is disproportionate when compared to prior cases. This contention is also successive. *High*, supra, at pp. 297-8, 276 S.E.2d 5.

[19] 22. High argues that the death penalty is excessive as the evidence shows he was only an aider and abettor to the murder of the victim. The evidence, including High's own statements, clearly supports an inference to the contrary, and *Enmund v. Florida*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), is distinguishable on its facts.

[20] 23. Electrocution is not cruel and unusual punishment as compared to other possible methods of carrying out the death penalty.

Judgment affirmed.

All the Justices concur.

SABEL et al.,

v.

The STATE.

No. 39132.

Supreme Court of Georgia.

March 4, 1983.

Defendants were convicted in the State Court, Fulton County, John A. Bruner, J., of failure to disperse, and they appealed. The Supreme Court, Bell, J., held that: (1) statute requiring dispersal of gatherings upon request or order of peace officer or firemen, in interest of public safety, was neither unconstitutionally vague nor overbroad; (2) defendants' arrests and convictions did not violate their First Amendment rights; (3) defendants were not selectively prosecuted; and (4) trial court did not abuse its discretion in denying motion for mistrial.

Judgment affirmed.

STATE OF GEORGIA

JOSE MARTINEZ HIGH,	:	
Petitioner,	:	CIVIL ACTION
	:	
VS.		FILE NO. 5585
	:	
WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC & CLASSIFICATION CENTER,	:	HABEAS CORPUS
	:	
Respondent.	:	

- -

O R D E R

The matter now pending before this Court is a Petition for Writ of Habeas Corpus in a death penalty case. The Petitioner, Jose Martinez High, is currently serving two death sentences imposed by jury at trial in the Superior Court of Taliaferro County. Petitioner was convicted of the offenses of murder, two counts of kidnapping with bodily injury, armed robbery, possession of a firearm during the commission of a crime, and aggravated assault and was sentenced to death for the murder, armed robbery, and both counts of the kidnapping with bodily injury. On direct appeal the Supreme Court of Georgia affirmed the convictions for armed robbery, murder and two counts of kidnapping with bodily injury but set aside the convictions for possession of a firearm and aggravated assault holding these crimes merged into the crimes of armed robbery and kidnapping with bodily injury. The Court also affirmed the death penalty in two of the four counts for which Petitioner was sentenced to death setting aside the death sentences for the armed robbery conviction and one count of kidnapping with bodily injury conviction where the victim did not die. High V. State, 247 Ga. 289 (1981). Subsequently, a Petition for Writ of Certiorari was denied by the United States Supreme Court on January 25, 1982 with a petition for rehearing denied on March 22, 1982.

Following these rulings a new execution date was set for July 6, 1982. On June 24, 1982 Petitioner filed a Motion for Stay of Execution

FILED Sept. 10 1982 at 8:15 AM
CHIEF DEP. CLERK
BUTTS SUPERIOR COURT

and a Petition for a Writ of Habeas Corpus in Butts County Superior Court. The Motion for Stay of Execution was denied by this Court on June 25, 1982. On appeal the Supreme Court of Georgia granted a Stay of Execution and remanded the case to this Court for a determination of the Petitioner's applicaion for Writ of Habeas Corpus by an evidentiary hearing on Petitioner's contention of ineffective assistance of counsel and other pertinent evidentiary matters on issues raised. On August 12, 1982 an evidentiary hearing was held with Petitioner present and represented by his counsel, Bradley S. Stetler. The Respondent was represented by Virginia H. Jeffries, Staff Assistant Attorney General.

At the hearing Petitioner limited his evidence and argument to the issue of ineffective assistance of counsel during the penalty phase of Petitioner's bifuricated trial. However, the Petitioner, High, has raised twenty-six grounds for granting relief in his habeas petition, each of which will be addressed by this Court. In rendering this decision the Court has considered not only the evidence presented at the hearing, but the complete transcript of Petitioner's trial in Taliaferro County and numerous affidavits submitted by counsel for Petitioner.

A substantial number of the allegations listed in the petition have previously been ruled on by appellate courts. Allegations concerning Witherspoon violations, restricted voir dire, state paid expert assistance, application of the doctrine of merger of crimes, the admissibility of certain tangible evidence such as photographs and fingerprints and whether the death sentence was arbitrarily imposed on the Petitoner have already been ruled on by the Supreme Court of Georgia on direct appeal. The Supreme Court has also ruled on other issues not raised in the habeas petition such as certain jury instructions, ruling on an in camera inspection in the presence of the jury, violation of the rule of sequestration, introduction of a statement by Petitioner, and the refusal to suppress the testimony of witness Phillips. High V. State, supra. Findings of appellate courts are binding on this Court for purposes of review. Elrod v. Ault, 231 Ga. 750 (1974). As each of the above named allegations have previously been raised and ruled upon those findings are binding on this

Court and those allegations are found to be without merit.

Additionally, the Georgia Supreme Court has ruled upon whether the High case violated the principle of law set out in Godfrey V. Georgia, 446 U. S. 420 (1980). The Court held that a death sentence based on a Ga. Code Ann. §27-2534.1 (b) 7, aggravating circumstance, i. e. that a murder, armed robbery or kidnapping was outrageously or wantonly vile, horrible and inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim was justified under the facts of the case and not a violation of Godfrey. Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i. e. torture to the victim) and will support a finding of depravity of mind of the defendant. Hance V. State, 245 Ga. 856 (1980). This issue as well as the allegation that Petitioner's death sentence constitutes cruel and unusual punishment because of his age at the time of sentence were raised in the Petition or Writ of Certiorari to the Supreme Court of the United States. Therefore, this Court finds no merit in either of these allegations.

Petitioner has made several general allegations regarding the constitutionality of the death penalty. Specifically, Petitioner alleges that the death penalty is unconstitutional as cruel and unusual punishment and that the means of execution in Georgia is harsh and outmoded. Georgia's death penalty statute has been upheld by the United States Supreme Court. Gregg v. Georgia, 428 U. S. 153 (1976). Petitioner has presented no evidence or advanced any argument which would lead this Court to change this position. According, these allegations are without merit.

Petitioner alleges that the exclusion for cause of prospective jurors unequivocally opposed to the death penalty denied him his right to an impartial jury. This argument has been rejected in Smith v. Balcom, 660 F. 2d. 573 (1981) and is, therefore, found to be without merit.

The Petitioner challanges Ga. Code Ann. §59-905, the preemptory strike statute, as unconstitutional. The Petitioner alleges the state used its preemptory strikes to systematically exclude blacks from the jury. On direct appeal the Supreme Court of Georgia has held the defendant was

not denied due process of law by the preemptory striking of some black potential traverse jurors. High v. State, supra. Petitioner has presented no new evidence to show his death sentence was the result of any intentional discrimination nor has he convinced this Court that Ga. Code Ann. §59-905 violates his constitutional rights. The Court finds this allegation to be without merit.

The Petitioner alleges that the venue of his trial should have been changed due to extensive pre-trial publicity. The test as to whether unfavorable newspaper (or other media publicity) has so prejudiced a case against one accused of a crime that a fair trial cannot be had is whether the jurors summoned to try the case have formed fixed opinions as to the guilt or innocence of the accused from reading such unfavorable publicity. Jarrell v. State, 234 Ga. 410 (1975). After a careful review of vior dire this Court finds that the jurors selected had no fixed opinion as to either the guilt or innocence of the Petitioner based on media accounts of the crime and that a change of venue was unnecessary. This Court also finds that Petitoner's specific allegations regarding six propective jurors who were not struck because of their exposure to pre-trial publicity did not deny Petitioner his right to a fair trial. A complete review of the vior dire questioning of these six jurors revealed no fixed opinions. These allegations are thus without merit. Similarly, Petitioner's allegation that his voir dire questioning was erroneously restricted by the Court and that the Court erroneously allowed the indictment to be read to the jury panel are also without merit.

Concerning the Petitioner's allegation that he was denied the right to a speedy trial. The record indicates that his trial was delayed by successful chall nges to the composition of the grand jury. These challenges were instigated by the Petitioner and it was due to these challenges that Petitioner did not go to trial sooner. Given these circumstances this allegation is without merit.

Petitioner next presents several allegations under a heading entitled denial of a fair trial. These allegations include failure of the Court to require the state to produce certain evidence, violation of the rule of sequestration, restriction of vior dire, failure to suppress

the testimony of witness, Henry Phillips, and the admission of prejudicial evidence. After a review of these allegations this Court concludes that most of these points have already been ruled on adversely to Petitioner in High v. State, supra. Petitioner presented no evidence or argument in favor of his position and this Court finds no merit in any of these alleged errors.

The Petioner alleges that the trial Court erred in failing to transcribe bench conferences between the Court and counsel after a Motion for Complete Recordation of the Proceedings was made by Petitoner's trial counsel. The burden was on the Petitioner to have the record completed according to the provisions of Ga. Code Ann. §6-805 (f). Petitioner has presented no evidence that his trial counsel was negligent in failing to get these conferences recorded or that such conferences occurred and were not recorded. There is, therefore, nothing for an appellate court to review, Neal v. State, 161 Ga. App. 77 (1982) and this allegation is without merit.

Petitioner also alleges that he has a right to state paid assistance for habeas corpus purposes. There is no requirement that the state assist Petitioner with funds, contrary to his assertion. Failure to assist the Petitioner is not a constitutional deprivation of rights. Harris v. Hopper, 243 Ga. 244 (1979). Accordingly, this allegation is without merit.

The Petitioner's next enumeration of error is that the trial Court's instructions on presumption of intent were improperly burden shifting in violation of Sandstrom v. Montana, 442 U. S. 510 (1979). This Court has examined the jury charge in question and finds that the charge complained of was not improper and that the presumptions and inferences created were permissive ones. Ulster County Court v. Allen, 442 U. S. 140 (1979(. This Court has also examined other instructions given during the guilt innocence phase of Petitioner's trial and finds no error.

The Petition for Habeas relief contains two separate allegations of improper prosecutorial comments and argument during both the guilt

innocence and sentencing phase of Petitioner's trial. A review of the trial transcript has revealed no prejudice by these remarks which amounts to a denial of constitutional due process in light of the strength of the evidence against the Petitioner. There is a distinction between conduct which is merely improper and condemned from that which constitutes a denial of due process. This Court finds the prosecutor's comments fall into the former category and are thus not so prejudicial as to render the trial fundamentally unfair in violation of the due process clause. Easter v. Estelle, 609 F. 2d. 756 (5th Cir. 1980). Cobb v. Wainwright. 609 F. 2d 756 (5th Cir. 1980).

The Petioner also alleges that his death sentence was unconstitutionally imposed because after the Supreme Court vacated the two death sentences for armed robbery and kidnapping with bodily injury, High v. State, supra., the Court failed to remand the case for resentencing on the other death convictions. The Petitioner argues the failure to do so is in violation of Stephens v. Zant, 631 F. 2d. 397 (5th Cir. 1980). Contrary to this assertion, Stephens is not applicable to Petitioner's case and this allegation is without merit. As to mitigating circumstances the trial Court adequately instructed the jury about considering mitigating evidence and this Court finds the charge comports with Spivey v. Zant, 661 F. 2d. 464 (1981)

The final and most important allegation of the Petitioner is that trial counsel for Petitioner rendered ineffective assistance of counsel in that this attorney failed to produce any witnesses or other mitigating evidence in the sentencing phase of trial. Claims of ineffective assistance of counsel must be judged by the standard that the right to counsel means the right to effective counsel and not errorless counsel or counsel judged ineffective by hindsight but counsel reasonably likely to render and rendering reasonably effective assistance. Pitts v. Glass, 231 Ga. 638 (1974). MacKenna v. Ellis, 280 F. 2d. 592 (5th Cir. 1960).

The Petitioner was represented at trial by John Ruffin, an attorney of over twenty years experience. Ruffin devoted a substantial part of his practice to criminal trial work and had previously represented other

defendants in capital cases where the death penalty was sought. Mr. Ruffin was retained counsel and personally spent over fifty hours in preparation for trial. Additionally, Ruffin was assisted by two legal interns (law students) from the Southern Poverty Law Center. As a result of his efforts on Petition's behalf, Ruffin was able to successfully challenge the composition of the Grand Jury.

At the habeas hearing, Ruffin was subjected to rigorous examination by Bradley Stetler, current counsel for Petitioner, about his handling of the sentencing phase of the trial. Ruffin testified that he tried to produce some competent witnesses to testify in mitigation but was unable to uncover any despite the efforts of both he and his legal assistants. Additionally, the defendant, High and his parents, who were actively supportive, were consulted and were unable to furnish help in this area. In regard to placing the parents themselves on the stand during mitigation evidence Ruffin testified he made a conscious decision not to do so as part of his trial strategy.

This Court is aware that Petitioner and his counsel have now produced a number of affidavits from people who now state they would have been willing to testify at trial during the sentencing phase. However, as Ruffin testified, it is not unusual for potential witnesses to come forward after trial with offers of help and this this in fact did occur after the High trial was over. It should also be noted that counsel for Petitioner produced none of these potential witnesses at the habeas hearing for more revealing direct and cross examination. In view of the testimony that Ruffin was aware of the law and his obligation to produce mitigating evidence and made a diligent effort to find such witnesses, this Court finds that Petitioner was furnished with effective assistance of counsel and that this ground is without merit.

Thus, after a thorough review of the petition for Writ of Habeas Corpus, a complete examination of the trial record and consideration of all evidence presented, this Court finds that all of Petitioner's enumerated errors to be without merit. Additionally, this Court has searched the record for other unenumerated errors and found none.

Therefore, this Petition for Writ of Habeas Corpus is hereby denied.

This the 10 day of September, 1982.

SAM L. WHITMIRE
JUDGE, SUPERIOR COURT
FLINT JUDICIAL CIRCUIT

Clerk's Office, Supreme Court of Georgia

ATLANTA 5/11/83

The motion for a rehearing was denied today:

Case No. 39371, High v. Zant, Warden

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

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SUPREME COURT, U.S.

83-5148

No. 82-

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

JOSE MARTINEZ HIGH,

Petitioner,

vs.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Comes now petitioner, Jose Martinez High, by counsel, in the above-styled action and moves this Court for leave to proceed in forma pauperis without first being required to prepay fees or costs or otherwise to give security therefore. In support of this motion, petitioner states that he has been permitted to proceed in forma pauperis at trial, on appeal to the Georgia Supreme Court and in his collateral attack in the state courts of his convictions and death sentence. Petitioner attaches hereto an Affidavit in support of this motion.

Respectfully submitted,

JOSE MARTINEZ HIGH,
By Counsel

Bradley S. Stetler

BRADLEY S. STETLER
419 Seventh Street, N.W.
Suite 202
Washington, D.C. 20004
(202) 638-4798

Counsel for petitioner

IN THE SUPREME COURT OF GEORGIA

No. 39371

RECEIVED
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SUPREME COURT, U.S.

JOSE MARTINEZ HIGH, :
Petitioner, :
v. :
WALTER D. ZANT, et al., :
Respondent. :

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Jose Martinez High, being first duly sworn, depose and state that I am the petitioner in the above-styled case; that in support of my motion to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting this appeal are true.

1. Are you presently employed? NA

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. August 16, 1976 - $210 - Furman

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividend or other source? NA

(a) If the answer is yes describe each source of income and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings accounts? NO

(a) If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? NO

(a) If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

_____

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

JOSE MARTINEZ HIGH

SUBSCRIBED AND SWORN TO before me this 29 day of November, 1982.

Notary Public

My Commission expires:
9-20-83